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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE LUIS HERRERA,

Defendant and Appellant.

E054953

(Super.Ct.No. SWF1100814)

OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III, Judge. Affirmed as modified.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Anthony Dasilva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jorge Luis Herrera appeals after he was convicted of one count of resisting an executive officer by force or violence (Pen. Code, § 69), and

one count of misdemeanor battery on a peace officer (Pen. Code, § 243, subd. (b)). He contends that the trial court erred in instructing the jury on the intent required to find a violation of resisting a peace officer; he argues that the court should have instructed, sua sponte, that a specific intent was required. Defendant also contends that the sentence on the misdemeanor battery should be stayed pursuant to Penal Code section 654. We order the sentence on the misdemeanor count stayed, but otherwise affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Riverside County Deputy Sheriff Dawn Gouvion was on duty in the courthouse in Murietta on the morning of March 17, 2011. She was called into Department 204 to assist another deputy, as there was a large number of people in the courtroom. Defendant was seated in the jury box with other in-custody defendants. Defendant was being assisted by a Spanish-language interpreter.

Defendant's case was called by the court, and the prosecutor asked for a continuance in defendant's case. Defendant immediately began screaming, "No postpone!" The trial judge ordered defendant to stop screaming, but defendant continued to scream and act aggressively.

Deputy Gouvion approached the box where defendant was sitting. Through the interpreter, Deputy Gouvion told defendant not to speak unless the judge spoke to him. Defendant ignored this instruction, however, and continued yelling loudly; he also moved aggressively, standing up abruptly while shouting very angrily. Defendant was already wearing restraints—waist and leg chains, and handcuffs. Deputy Gouvion

took hold of defendant by his wrist and shoulder in a control hold, and began guiding him from the courtroom.

When defendant realized he was being escorted from the courtroom, he became even more upset. He kept screaming, and began to struggle with the deputy, first pushing into her and then pulling sharply away. As Deputy Gouvion maneuvered defendant into a short hallway outside the courtroom, she reached for her radio to call for backup assistance. Defendant lunged toward her, knocking the radio from her hand and jamming her finger. Deputy Gouvion responded by pushing defendant against a wall. He was still screaming, and tried to turn toward her.

During the entire time, Deputy Gouvion admonished defendant to relax, to calm down, and to stop moving. The interpreter was nearby and translated these orders to defendant. Deputy Gouvion was able to turn defendant to face the wall and moved him to a corner of the hallway. She again radioed for backup, this time successfully. As she waited for assistance to arrive, she attempted to keep control of defendant, who was still screaming and struggling aggressively.

Deputy James Jason was the first to arrive on the scene to assist. He saw defendant trying to push into Deputy Gouvion, and rotating from side to side to try to break her hold on him. Defendant was not obeying the deputy's orders to calm down and stop moving. Deputy Jason stepped in and pinned defendant against the wall to restrict his movements. This allowed Deputy Gouvion to step back and recover her breath. Defendant twisted his body from side to side, trying to break free. Other

deputies then arrived and defendant was eventually restrained. Deputy Jason saw afterward that Deputy Gouvion had sustained a cut on her elbow.

The interpreter testified at trial that defendant became very upset when the court ordered the matter continued. Defendant began shouting, “No postpone, no postpone.” When Deputy Gouvion took defendant out of the courtroom into the back hallway, she saw defendant throw his chest and shoulder into the deputy, slamming her against a wall. The deputy responded by pushing defendant against a wall and holding him there, until other deputies arrived to assist her.

Deputy Gouvion testified at trial that, when she was relieved by Deputy Jason and the other officers, she realized that her jammed finger was numb and painful. She was not able to bend her finger. She saw that defendant had been cut on his elbow, and was bleeding down his arm. Later that day, she discovered that she had suffered a cut to her own right elbow.

As a result of this incident, defendant was charged with felony battery on a peace officer (count 1) and resisting an executive officer by force or violence (count 2). During trial, the prosecutor amended the charge in count 1 to a misdemeanor battery on a peace officer. A jury convicted defendant of both charges.

The court sentenced defendant to a determinate middle term of two years on count 2 (resisting by force or violence), and a concurrent term of 90 days on count 1.

Defendant filed a timely notice of appeal.

ANALYSIS

I. The Court Properly Instructed the Jury on the Intent Required to Find a Violation of Penal Code Section 69

Defendant contends that the trial court erred in failing to instruct, sua sponte, that Penal Code section 69 was a specific intent crime, and to instruct the jury on the required specific intent.

Penal Code section 69 provides: “Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.” The statutory language creates “ ‘two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty.’ [Citations.]”

(*People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.)

The first type of offense, attempting to deter an officer from the performance of his or her duties, “is ‘established by “ ‘[a] threat, unaccompanied by any physical force’ ” and may involve either an officer’s immediate or future performance of his duty. [Citation.]’ [Citation.] To avoid infringement on protected First Amendment speech, ‘the term “threat” has been limited to mean a threat of unlawful violence used

in an attempt to deter the officer. [Citations.] The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made.’ [Citations.]” (*People v. Nishi* (2012) 207 Cal.App.4th 954, 967.) This type of offense under Penal Code section 69 “ ‘requires a specific intent to interfere with the executive officer’s performance of his [or her] duties’ [Citations.]” (*Ibid.*)

However, the second type of offense, actually resisting an executive officer, is a general intent crime. (*People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1421.)

Here, the gravamen of the offense charged under Penal Code section 69 was of the second type. Defendant made no threats with intent to deter Deputy Gouvion from the present or future performance of her duties. Rather, he simply acted physically, with force and violence, in resistance to Deputy Gouvion’s efforts to control him and escort him from the courtroom. In so doing, he rammed his chest and shoulder into the deputy, and slammed her against the wall. “ ‘When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. . . .’ [Citation.]” (*People v. Rasmussen, supra*, 189 Cal.App.4th at p. 1419.)

Although defendant complains that the trial court failed to instruct on both types of offense encompassed within Penal Code section 69, there was no evidence that defendant was guilty of the first type, attempting to deter by threats. A trial court

has no duty to instruct sua sponte on issues which are not supported by evidence in the record. (See *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386 [“a trial judge must only give those instructions which are supported by substantial evidence”].)

II. The Concurrent Sentence on Count 1, Misdemeanor Battery on a Peace

Officer, Should Be Stayed

Defendant also argues that the trial court erred in imposing an unstayed concurrent sentence of 90 days on the misdemeanor count of battery on a peace officer. The People concede that the convictions of both offenses were based on the same facts. Accordingly, Penal Code section 654 requires that the misdemeanor sentence be stayed.

DISPOSITION

The trial court was not required to instruct sua sponte on the issue of specific intent. The type of violation with which defendant was charged under Penal Code section 69 was actual resistance, not attempted deterrence. Actual resistance to an executive officer is a general intent crime.

Because both convictions—resisting an executive officer and misdemeanor battery on a peace officer—are based upon the same acts, the misdemeanor sentence on count 1 must be stayed pursuant to Penal Code section 654. We order the trial court to correct the sentencing minute order to reflect that the sentence on count 1 is stayed, and direct the court to transmit the corrected minute order to the Riverside

County Sheriff's Department. With the exception of the correction of the judgment to stay the sentence on count 1, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

KING
J.